

University of Groningen

The principle of systemic integration in human rights law

Rachovitsa, Adamantia

Published in:
International and Comparative Law Quarterly

DOI:
[10.1017/S0020589317000185](https://doi.org/10.1017/S0020589317000185)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Final author's version (accepted by publisher, after peer review)

Publication date:
2017

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):
Rachovitsa, A. (2017). The principle of systemic integration in human rights law. *International and Comparative Law Quarterly*, 66(3), 557-588. <https://doi.org/10.1017/S0020589317000185>

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

The Principle of Systemic Integration in Human Rights Law - A Critical Appraisal

Dr Adamantia Rachovitsa*

Forthcoming at International & Comparative Law Quarterly, 2017

This version has been accepted for publication. It has been revised following peer review 1
but it is subject to editorial input by CUP

I. INTRODUCTION

The principle of systemic integration is being expounded as *the* answer to certain difficulties arising from the fragmentation of public international law (PIL), in a similar vein to the way that ‘number 42’ was the ultimate answer to everything in the universe in the novel, ‘The Hitchhiker’s Guide to the Galaxy’.¹ International lawyers and judges contemplate and discuss systemic integration without, however, explaining the application of this principle of interpretation in legal reasoning. This article makes two arguments: First, the *uncritical* application of systemic integration raises serious interpretational and jurisdictional concerns. Second, systemic integration does not necessarily yield the results hoped for, but may instead create new hegemonies among international courts and give rise to a poorer and less diverse international law in the future.

The article focuses on the application of systemic integration of treaties – more specifically, in the human rights area. Although the function of systemic integration has been explored across different functional regimes (e.g. trade law or investment law vis-à-vis human rights), not much has been written concerning the human rights regime itself. The analysis discusses the case law of the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the African Court of Human and Peoples’ Rights (ACtHPR). The study of the application of systemic integration in human rights law draws lessons for the development of human rights law and international law. International human rights courts are particularly inclined to apply this principle of interpretation. Although human rights treaties are not inherently

* Assistant Professor of Public International Law, Department of International Law, Faculty of Law, University of Groningen, The Netherlands; PhD (Nottingham) [a.rachovitsa@rug.nl]. I would like to thank Professor Sandesh Sivakumaran and Eva Kassoti for constructive feedback on an earlier version of this article. Thanks are also due to the anonymous reviewers for their valuable comments. Responsibility for errors or omissions rests with the author alone.

¹ D Adams, *The Hitchhiker’s Guide to the Galaxy* (Random House, 1995).

different vis-à-vis other treaties, they are drafted in a distinctively open textured manner which makes them conducive to further development. Moreover, permanent international courts on human rights engage with international law questions, including interpretative issues, on a regular basis and, hence, are bound to reflect on and refine their approaches in a more systematic way than other international courts.² Therefore, their case law should provide a useful understanding of the difficulties arising from the application of systemic integration and lessons to be learned by international law, in general. Finally, the human rights regime evidences a certain propensity toward innovation often in terms of addressing how human rights law can include and articulate other interests (human rights-related or not) under international law. Systemic integration is used as the interpretative means (and justification) for international courts to engage in this exercise. The analysis demonstrates the rarely discussed implications of this exercise to the progressive development of international law.

The question of the fragmentation of PIL has been at the forefront over the last decade. The diversification and expansion of the scope of PIL, and the proliferation of international bodies exercising (semi-) judicial functions, have increased the likelihood of conflicting or diverging interpretations of similar or identical rules.³ Interpretation is considered to be the main approach for mitigating such difficulties.⁴ A treaty shall be construed, as far as possible, in consistency with other PIL rules. Article 31 (3)(c) VCLT is of interest in this regard, since it specifically points out that a treaty shall be interpreted by taking into account any relevant rules of international law applicable in the relations between the parties.

Fragmentation of PIL, however, does not concern only the risk of divergences among international courts. The discussion is underpinned by an equally important concern: due to their limited jurisdiction, international courts are unable to grasp, and respond holistically (and therefore effectively) to, global legal problems. International courts decide the cases brought before them in a “piecemeal” fashion by ‘squeezing’;⁵

² P Webb, *International Judicial Integration and Fragmentation* (OUP, 2013) 157.

³ International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission finalised by M Koskenniemi, 13 April 2006, UN Doc A/CN.4/L.682 (ILC Final Rep).

⁴ ILC Final Rep (n 3) [34]-[37]; MT Kamminga, ‘Final Report on the Impact of International Human Rights Law on General International Law’ in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights on General International Law* (OUP, 2009) 1-2.

⁵ Sir F Berman, ‘Treaty Interpretation in a Judicial Context’ (2004) 29 Yale JIL 315.

or *reducing* the dispute to fit the court's competence.⁶ An international court is competent to decide a case *insofar* as the subject matter of the dispute falls within the scope of the treaty under discussion.⁷ A case will not be heard in all of its international law relevant aspects, and a given international court is not entitled to resolve the dispute itself; the court is mandated to decide the dispute pursuant to its jurisdiction and applicable law.⁸ The widening and enrichment of PIL, coupled with the proliferation of international bodies, has emphasised these disparities in PIL – and the fact that PIL itself is, to a great extent, fragmented. Similar or even identical rights and obligations under different treaties retain their *separate existence*, notwithstanding the treaties' respective contexts, their objects and purposes, the subsequent practice of parties and preparatory work.⁹ It follows that it is an inherent feature of any international court's judicial function to decide a case brought before it through the lens of its jurisdiction.

Against this background, systemic integration is being presented not only as a means to avoid dissonant interpretations and/or judgments, but also as a remedy for the “piecemeal” judicial function of international courts. The International Law Commission (ILC), in its work on fragmentation, is leading the way in asserting that systemic integration is the process whereby international treaty obligations are interpreted by reference to their normative environment, so that, consequently, treaties appear as parts of a coherent and meaningful whole. In this sense, systemic integration goes further than stating the applicability of general international law in the operation of treaties. It specifically points to the need to interpret one treaty by reference to another treaty, with the objective of ‘connect[ing] the separate treaty provisions [...] as aspects of an overall aggregate of the rights and obligations of the States’.¹⁰ This is arguably the most obscure aspect of systemic integration. Whereas, in general, taking other treaties into account when interpreting a treaty is part of the international lawyer's mindset and enhances consistency in PIL,¹¹ it is unclear what it means to set the *objective* to systemically *integrate* one treaty into another in order to achieve ‘a sense

⁶ Sir R Jennings, ‘Reflections on the Term “Dispute”’ in R StJ Macdonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff Publishers, 1994) 403.

⁷ L Caflisch, ‘The Law – Substantive and Procedural Questions’ (2008) 7 *The Law and Practice of International Courts and Tribunals* 294.

⁸ Webb (n 2) 158, 162.

⁹ International Tribunal for the Law of the Sea, *Mox Plant (Ireland v UK)* Provisional Measures, 3 December 2001 (2002) 41 ILM 405 [51] (emphases added).

¹⁰ ILC Final Rep (n 3) [467], [413]–[415].

¹¹ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO Panel Report, WT/DS291R, WT/DS292R/WT/DS293, 29 September 2006 [7.70].

of coherence and meaningfulness'.¹² Many scholars have endorsed the ILC's approach and, moreover, they posit that Article 31 (3)(c) VCLT may be taken to express the principle of systemic integration.¹³

This article's starting point is that the principle of systemic integration should not be equated to Article 31 (3)(c) VCLT. It argues that the principle of systemic integration¹⁴ – either *allegedly* derived from Article 31 (3)(c) VCLT or as a stand-alone principle – cannot remedy the international courts' fragmented lens.¹⁵ The purpose of interpretation is not to integrate treaties into a coherent whole, but to introduce any relevant rules in the process of a treaty's interpretation and to offer interpretative guidance (Article 31 (3)(c) VCLT being one means to do so).¹⁶ Part II of the article demonstrates that the application of systemic integration in many cases finds its place outside the realm of interpretation and raises serious jurisdictional concerns regarding the mandate of international courts. The crucial questions in legal reasoning with regard to pursuing systemic integration concern the degree to which other treaties will be relevant and the weight that will be attached to it in informing the interpretation of a given treaty.¹⁷

Part III turns to explore the reasons that systemic integration of treaties falls short of international lawyers' expectations. It submits that the principle is still shaped by – and possibly reinforces – existing institutional preferences and biases, and that it

¹² ILC Final Rep (n 3) [419].

¹³ *ibid* [410]-[460]; C McLachlan, 'The Principle of Systemic Integration and Article 31 (3)(c) of the Vienna Convention' (2005) 54 ICLQ 279; J d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in A Nollkaemper and OK Fauchald (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Hart Publishing, 2012) 141. Also, M Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP, 2010) 13; R Nordeide, 'The ECHR and its Normative Environment: Difficulties Arising from a Regional Human Rights Court's Approach to Systemic Integration' in Nollkaemper and Fauchald above, 131. P Merkouris, *Article 31 (3)(c) VCLT and the Principle of Systemic Integration* (Brill-Nijhoff, 2015).

¹⁴ The ILC Final Rep (n 3) [473]-[474]; McLachlan (n 13) 280; and Merkouris (n 13) equate the principle of systemic integration to Article 31 (3)(c) VCLT. Cf. B Simma and T Kill, 'Harmonising Investment Protection and International Human Rights: First Steps towards A Methodology' in C Binder et al. (eds), *International Investment Law for the 21st Century* (OUP, 2009) 678; R Higgins, 'A Babel of Judicial Voices? Ruminations From the Bench' (2006) 55 ICLQ 791; D French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules' (2006) 55 ICLQ 281; Webb (n 2); I van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP, 2009); M Samson, 'High Hopes, Scant Resources: A Word of Skepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2011) 24 LJIL 701; VP Tzevelekos, 'The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?' (2010) 31 Michigan JIL 621.

¹⁵ McLachlan (n 13) 288.

¹⁶ Samson (n 14) 710-713; Simma and Kill (n 14) 692-694; Webb (n 2) 5; van Damme (n 14) 365. R Gardiner, *Treaty Interpretation* (2nd edn, OUP, 2015) 327.

¹⁷ ILC Final Rep (n 3) [419], [435]-[438], [473]-[474]; McLachlan (n 13) 310; Gardiner (n 16) 327.

cannot serve as a tool to prioritise among important concerns either. Furthermore, systemic integration in human rights law does not necessarily always benefit the diversity of PIL, but, on the contrary, may hinder its progressive development. In an effort to create coherence, one runs the risk of reducing the existing or potential reach of PIL to the restricted vocabulary and structure of the human rights paradigm. Systemic integration fuels the phenomenon of exercising undue interpretative authority over other treaties, as well as raising the possibility of the emergence of new informal hegemonies among international courts. The analysis concludes that, despite the appealing nature of the principle of systemic integration, international courts and bodies should exercise caution.

II. INTERPRETATIONAL AND JURISDICTIONAL CONCERNS

This part of the article highlights the limits to the application of the principle of systemic integration when interpreting a given treaty. Three principal issues arise when the interpreter loses sight of the appropriate weight that should be attached to other treaties in order to inform the construal of the treaty under interpretation. First, systemic integration of treaties may lead the interpreter to disregard the textual limits set forth by the treaty under interpretation. Second, systemic integration can foster the risk of downplaying the contextual nuances between different treaties. Third, uncritically employing systemic integration may result in the indirect application and supervision of other treaties under the guise of interpretation, thereby raising serious implications for the court's mandates and legitimacy.

A. Disregarding the Textual Limits of the Treaty Under Interpretation

The obvious limit to applying systemic integration, as is the case with any interpretation principle, is the explicit letter of the treaty under interpretation.¹⁸ The weight accorded to other treaty provisions, and their impact on the construal of the said treaty, cannot lead to an interpretation that goes beyond its explicit text. There are instances, however, in which reliance upon other treaties drives an interpretation that distorts the language of a human rights treaty.

In the *Zolotukhin* case, the applicant alleged a violation of Article 4 of Additional Protocol 7 (Article 4 of AP7) to the European Convention on Human Rights

¹⁸ *Pretty v United Kingdom*, 29 April 2002 [39].

(ECHR),¹⁹ complaining that he had been prosecuted twice for the same offence.²⁰ Article 4 of AP 7 reads, ‘No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State’. The Court’s position at that point was that the term ‘offence’ should be understood by reference to the legal classification under national law. Hence, if an act was classified as two distinct criminal offences under municipal law, the prohibition under Article 4 of AP 7 would not apply. The Grand Chamber revisited the definition of the term ‘offence’ by finding recourse to similarly drafted treaty provisions envisaging formulations of the *ne bis in idem* principle. Reference was made to the respective provisions of the International Covenant on Civil and Political Rights (ICCPR);²¹ the Statute of the International Criminal Court;²² the Charter of Fundamental Rights of the European Union (EU Charter);²³ the Convention Implementing the Schengen Agreement;²⁴ and the Inter-American Convention on Human Rights (IACHR).²⁵ Article 14 (7) ICCPR and Article 50 EU Charter contain the term ‘offence’, Article 8 (4) IACHR refers to ‘cause’, Article 54 of the Schengen Agreement mentions ‘acts’ and Article 20 (1) ICC Statute refers to ‘conduct’. The Court emphasised that the jurisprudence of the Court of Justice of the European Union (CJEU) and the IACtHR followed the most favourable approach to the individual and that, for this reason, it could not ‘justify adhering to a more restrictive approach’²⁶ than the one followed by the CJEU and the IACtHR. The Grand Chamber unanimously overruled its previous case law and dramatically altered the scope of applicability of Article 4 AP 7.

The driving force behind the Court’s reasoning was the construal of the ECHR in light of relevant treaties and the Court’s willingness to align its position with the jurisprudence of other international courts. Nonetheless, the strong inferences drawn

¹⁹ (Concluded 4 November 1950; entered into force 3 September 1953) ETS 5.

²⁰ *Sergey Zolotukhin v Russia*, 10 February 2009 (Grand Chamber).

²¹ (Adopted 16 December 1966; entered into force 23 March 1976) 999 UNTS 171.

²² (Concluded 17 July 1998; entered into force 1 July 2002) 2187 UNTS 90.

²³ Official Journal of the European Communities, 18.12.2000, C 364/1.

²⁴ Convention Implementing the Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders (concluded 14 June 1985; entered into force 19 June 1990).

²⁵ (Concluded 21 November 1969; entered into force 18 July 1978) OAS Treaty Series No 36.

²⁶ *Zolotukhin* [80].

by the jurisprudence of the CJEU and the IACtHR on the pretext of the most favourable interpretation for the individual are ill founded. This is because the rulings of the two international courts develop the Schengen Agreement and the IACHR respectively, which encapsulate the *ne bis in idem* prohibition in broader terms to the ECHR.²⁷ Ironically, the ECtHR relied upon this practice in order to provide a broad definition to the specific and restricted term ‘offence’ under Article 4 of AP 7. The Grand Chamber afforded such great weight to these treaties that it effectively disregarded the textual limits of the ECHR. It is doubtful whether, as has been argued, this judgment is a positive example of constructive dialogue among international courts or an opportunity to fill in gaps.²⁸ The Grand Chamber in the *Mamatkulov and Askarov* and *Scoppola* cases overruled its previous jurisprudence by disregarding the limits set forth by the ECHR in a similar fashion.²⁹

Likewise, the IACtHR in *Artavia Murillo et al.* – a case concerning *in vitro* fertilisation and the question of whether Article 4 IACHR protects the right to life of the embryo – pursued a construal of the IACHR that went against its letter. Even though Article 4 (1) provides that ‘[the right to life] shall be protected by law and, *in general, from the moment of conception*’, the Court ruled that the embryo cannot be understood to be a person for the purposes of Article 4.³⁰ A forceful argument for reaching this conclusion was that trends in international law do not support the position that the embryo should be treated in the same way as a person, or that it has a right to life.³¹ The Court pursued the systematic interpretation of the IACHR by taking other treaties and instruments into account as well as the practice of human rights bodies,³² including the Universal Declaration on Human Rights;³³ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)³⁴ and the views of the CEDAW

²⁷ *ibid* [36]-[38], [40].

²⁸ Cf. Forowicz (n 13) 360-1; T Treves, ‘Judicial Lawmaking in an Era of “Proliferation” of International Courts and Tribunals: Development or Fragmentation of International Law?’ in R Wolfrum and V Röben (eds), *Developments of International Law in Treaty-Making* (Springer, 2005) 614-5.

²⁹ *Mamatkulov and Askarov v Turkey*, 4 February 2005 (Grand Chamber) [109]-[113], [123]-[125]. *Scoppola v Italy (No 2)*, 17 September 2009 (Grand Chamber) [96]-[110]; cf. Partly Dissenting Opinion of Judge Nicolaou joined by Judges Bratza, Lorenzen, Jočienė, Villiger and Sajó in *Scoppola*, 44-7.

³⁰ *Artavia Murillo et al. (In vitro fertilization) v Costa Rica*, IACtHR Series C 257 (2012) [264] (emphases added).

³¹ *ibid* [253].

³² *ibid* [224]-[244].

³³ United Nations General Assembly (UNGA) Res 217 A (III) (10 December 1948).

³⁴ Convention on the Elimination of All Forms of Discrimination against Women (concluded 18 December 1979; entered into force 3 September 1981) 1249 UNTS 13.

Committee; the Convention on the Rights of the Child (CRC);³⁵ the ICCPR and the practice of the Human Rights Committee (HRC); the African Charter on Human and People's Rights (ACHPR);³⁶ and, finally, the ECHR and case law of the ECtHR. However, this was an inappropriate application of systemic integration, not only because many of these treaties do not bind the member states to the IACHR³⁷ but also, most importantly, because none of these treaties explicitly protect unborn life. Article 4 IACHR is a unique formulation of the right to life in international human rights law and, hence, it is questionable how other (general) treaties and instruments shed light on its interpretation. The Court's problematic line of reasoning is illustrated by its reference to the *Vo. v France* case, in which the ECtHR highlighted that '*unlike Article 4 of the American Convention on Human Rights, which provides that the right to life must be protected "in general, from the moment of conception", Article 2 of the Convention is silent as to the temporal limitations of the right to life [...]*'.³⁸

Most international human rights treaties are able to accommodate change through time due to their vaguely drafted text, affording considerable leeway to the interpreter. Yet, the interpreter cannot pursue a construal of the treaty that qualifies as a revision of the text.³⁹ In the foregoing cases the ECtHR and the IACtHR seem to have crossed that line.

B. Duly Appreciating the Contextual Nuances between Different Treaties?

International courts and bodies have an extensive case law drawing synergies and links between the treaty that they interpret and apply and other treaties. This practice is welcome and attuned to the goal of pursuing coherence in PIL. Nonetheless, taking account of norms that are similar or identical to those in the treaty under interpretation is subject to pertinent contextual nuances pertaining to the purpose, function and aims of the other treaty provisions.⁴⁰ In order for the interpreter to

³⁵ Convention on the Rights of the Child (adopted by UNGA Res. 44/25 (20 November 1989) UN Doc A/RES/44/25; entered into force 2 September 1990) 1577 UNTS 3.

³⁶ (Adopted 27 June 1981; entered into force 21 October 2001) 1520 UNTS 217.

³⁷ Dissenting Opinion of Judge Eduardo Vio Grossi in *Artavia Murillo et al.* 113, 128; LM De Jesús, 'A Pro-choice Reading of a Pro-life Treaty: The Inter-American Court on Human Rights' Distorted Interpretation of the American Convention on Human Rights in *Artavia v. Costa Rica* (2014) 32 Wisconsin ILJ 250-2.

³⁸ *Vo. v France*, 8 July 2004 (Grand Chamber) [75] (emphases added). See Dissenting Opinion of Judge Eduardo Vio Grossi in *Artavia Murillo et al.* 113.

³⁹ Human Rights Committee, *Atasoy and Sarkut v Turkey*, Communication Nos 1853/2008 and 1854/2008, UN Doc CCPR/C/104/D/1854-1854/2008, 29 March 2012 [7.13].

⁴⁰ *Mox Plant* (n 9); Permanent Court of Arbitration, *Access to Information under Article 9 of the OSPAR*

ascertain and give due regard to such nuances, he/she needs to not only identify the core of similarity among *equivalent*⁴¹ treaty provisions but also appreciate the differences between them. The question is, therefore, whether international courts meaningfully engage with another treaty so as to value the different context from which these provisions originate. It is important that the international judge examines and explains how that treaty is relevant and, accordingly, how it informs the construal of the treaty under interpretation. This section argues that such nuances are easily disregarded.

The *Van der Mussele* and *Siliadin* cases exemplify how the ECtHR should give consideration to other treaties while preserving the ECHR's specificity.⁴² In *Van der Mussele*, the applicant alleged a violation of the prohibition on forced or compulsory labour under Article 4 (2) ECHR. The Plenary Court had recourse to the 1932 International Labour Organisation (ILO) Convention concerning Forced or Compulsory Labour⁴³ and the 1959 ILO Convention on the Abolition of Forced Labour.⁴⁴ The definition of forced or compulsory labour contained in ILO Convention No 29 and the standards adopted by the ILO Committee of Experts⁴⁵ had an informative impact on the construction of Article 4 ECHR. The Court underlined that the ILO Convention will provide the '*starting point* for the interpretation of Article 4',⁴⁶ but that 'sight should not be lost of [the European] Convention's special features'.⁴⁷ The question as to whether the applicant *unwillingly* offered his services was not assessed against the formal ILO approach to the meaning of consent⁴⁸ but against the structure and the aims of Article 4 ECHR. Hence, the ECtHR neither employed an unqualified reliance on, nor integrated, ILO Convention No 29. Likewise, in the *Siliadin* case, the ECtHR took cognisance of the ILO Convention No 29 to define 'forced or compulsory labour', according to which the work or service has to be extracted by an individual

Convention (Ireland v UK), Final Award, 2 July 2003, 42 ILM 1118 [142].

⁴¹ Broude and Shany use the term 'equivalent' to denote norms that are identical or similar in their normative context and have been established through different instruments, or are applicable in different substantive areas of law, in T Broude and Y Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, 2011) 5, 9.

⁴² *Van der Mussele v Belgium*, 23 November 1983 (Plenary).

⁴³ Convention concerning Forced or Compulsory Labour, C29 (concluded 28 June 1930; entered into force 1 May 1932) 39 UNTS 55 (ILO Convention No 29).

⁴⁴ Convention concerning the Abolition of Forced Labour, C105 (concluded 25 June 1957; entered into force 17 January 1959) 320 UNTS 291 (ILO Convention No 105).

⁴⁵ 'Abolition of Forced Labour': General Survey by the Committee of Experts on Application of Conventions and Recommendations, 1979.

⁴⁶ *Van der Mussele* [32] (emphases added).

⁴⁷ *ibid.*

⁴⁸ *ibid* [37].

under the *menace of penalty*. Although the applicant in these specific circumstances had not been threatened by a penalty, the Court found that she was in an equivalent situation due to her vulnerable position.⁴⁹ In this way, the Court, in light of the specific facts, equated the ILO standard of *being threatened* by a menace of penalty to *perceiving to be threatened* by a penalty.

In contrast, in other instances the ECtHR drew interpretative guidance from other treaties while ignoring contextual differences and uncritically transposing detailed standards into the ECHR's scope. In the *National Union of Rail, Maritime and Transport Workers* case, the Court held that the Convention protects sympathy strikes. It employed a series of relevant international treaties and practice in its legal reasoning, but it failed to examine exactly how these norms were relevant and how they aided the interpretation of Article 11 ECHR.⁵⁰ The Court stressed that the ILO Committee of Experts and the Committee on Freedom of Association supported in their views the assertion that a general prohibition of sympathy strikes violates the right to strike, even though these bodies simply mentioned that a general ban *could* lead to abuse *in light of the specific circumstances*.⁵¹ Further, the restrictions set forth to the right to strike, as envisaged in the EU Charter, were not sufficiently addressed. Finally, the Court heavily relied upon Article 6 of the European Social Charter (ESC),⁵² without acknowledging that most of Article 6's undertakings are optional and that ten European states have chosen not to guarantee the right to strike under the ESC.

The expansive interpretation of the ECHR in the *National Union of Rail, Maritime and Transport Workers* case follows up the Court's approach in the area of socio-economic rights. In *Demir and Baykara*, the Grand Chamber accepted that the right of public officials to form and join a trade union and to bargain collectively has become one of the essential elements of Article 11 ECHR.⁵³ This judgment also paved the way for recognising the right to strike and the right to collective action under Article 11.⁵⁴ The legal reasoning in these cases was underpinned by consideration of the ILO

⁴⁹ *Siliadin v France*, 26 July 2005 [118].

⁵⁰ *National Union of Rail, Maritime and Transport Workers v United Kingdom*, 8 April 2014 [26]-[37], [76], [84]-[104]; cf. Concurring Opinion of Judge Wojtyczek, 47-9.

⁵¹ V Velyvyte, 'The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence' (2015) 15 HRLR 80.

⁵² European Social Charter (revised) (concluded 3 May 1996; entered into force 1 July 1999) CETS No 163.

⁵³ *Demir and Baykara*, 12 November 2008 (Grand Chamber) [65]-[86], [153]-[154].

⁵⁴ *Enerji Yapi-Yol Sen v Turkey*, 21 April 2009 [16], [24], [31]; *Danilenkov and Others v Russia*, 30 July 2009 [102]-[108], [123].

Conventions and the ESC as well as their progressive development by their respective monitoring bodies. The judgments share the same methodology: namely, discerning an alleged common denominator by reference to a great variety of treaties. One could argue that this so-called integrated approach to the interpretation of the ECHR seeks to integrate socio-economic rights into the construal of individual and political rights, and that it is founded upon the ideas of cross-fertilisation and convergence among different treaties.⁵⁵ Yet the ideas of cross-fertilisation or convergence of treaty norms cannot justify the transplantation of detailed treaty provisions into the scope of the ECHR.

Another example demonstrating how the ECtHR pursues systemic integration by ignoring crucial contextual differences is the *Opuz* case. The applicant claimed a breach of Article 2 due to the lack of a deterrent effect in Turkish legislation, since perpetrators of domestic violence could not be prosecuted if the victim withdrew her complaint. Despite the clear absence of consensus among member states on this matter, the Court ruled that states have the positive obligation under the ECHR to establish and effectively apply a system punishing all forms of domestic violence, and to provide sufficient safeguards for the victims.⁵⁶ This conclusion was reasoned by invoking the due diligence standard as a yardstick for assessing state responsibility in the context of violence against women.⁵⁷ In the process of discerning a common denominator by taking a series of treaties and international practice into account, the ECtHR detached the *different variants* of the due diligence standard from their treaty contexts. More specifically, the Court drew upon General Recommendation 19 issued by the CEDAW Committee and the Committee's views in individual communications, including the *A.T. v Hungary* case.⁵⁸ A careful reading of *A.T.* reveals that the CEDAW Committee did not explicitly refer to a failure to exercise due diligence.⁵⁹ The ECtHR also devoted special attention to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, which was the only treaty in force (at the time)

⁵⁵ V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 HRLR 538; cf. H Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 HRLR 72.

⁵⁶ *Opuz v Turkey*, 9 June 2009 [87]-[90], [138], [145].

⁵⁷ UNGA Res 48/104, 'Declaration on the Elimination of Violence Against Women' (20 December 1993) UN Doc A/RES/48/104.

⁵⁸ *A.T. v Hungary*, CEDAW Committee, Communication No 2/2003, 26 January 2005; *Fatma Yildirim v Austria*, CEDAW Committee, Communication No 6/2005, 6 August 2007.

⁵⁹ Report of the UN Special Rapporteur on Violence against Women, its Causes and Consequences (20 January 2006) UN Doc E/CN.4/2006/61 [23].

addressing violence against women,⁶⁰ and the practice of the Inter-American Commission on Human Rights (IACmHR). In the *Maria Da Penha v Brazil* case, the IACmHR held that states must exercise due diligence by preventing and investigating domestic violence incidents.⁶¹ The ECtHR, however, did not read this case with the caveat in mind that the IACmHR employed the due diligence standard by ascertaining jurisdiction over, and applying, the specialised Belem Convention (and not the IACHR).⁶²

In *Lohe Issa Konate v Burkina Faso*, the question before the African Court of Human and Peoples' Rights was whether the harsh criminal penalties levied by Burkina Faso against the applicant, on charges of defamation, represented a disproportionate interference with his right to freedom of expression under the African Charter on Human and Peoples' Rights.⁶³ A specific feature of the right to freedom of expression, and other rights envisaged in the ACHPR, is that they are subject to the so-called clawback clauses.⁶⁴ According to Article 9 (2), 'Every individual shall have the right to express and disseminate his opinions within the law'. The idea behind subjecting the right of freedom of expression to the limits of domestic law is to give considerable leeway to member states. The Court, however, held that the phrase 'within the law' must be interpreted in reference to international standards.⁶⁵ It based its reasoning on a consideration of Article 19 ICCPR and the views of the HRC (and the African Commission's practice).⁶⁶ Although this is, in principle, a welcome development in the context of a growing convergence among international courts when interpreting limitation and clawback clauses,⁶⁷ it is not entirely clear to what extent other treaties may be used in this regard. The ICCPR, the IACHR and the ECHR do not contain similar clauses and, therefore, one might question whether they can be used to "neutralise" these clauses in the ACHPR. In fact, the only similar human rights treaty

⁶⁰ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (concluded 9 June 1994; entered into force 5 March 1995) (1994) 33 ILM 1534 (Belem Convention).

⁶¹ *Maria Da Penha v Brazil*, Report No 54/01 [55], [56].

⁶² *ibid* [60].

⁶³ *Lohe Issa Konate v Burkina Faso*, ACtHPR App No 004/2013 (2014) [164], [176].

⁶⁴ CA Odinkalu, 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' in MD Evans and R Murray (eds), *The African Charter on Human and Peoples' Rights* (CUP, 2002) 195.

⁶⁵ *Lohe Issa Konate* [125]-[131].

⁶⁶ *ibid* [128]-[129].

⁶⁷ D Shelton, 'International Decisions' (2015) 109 AJIL 635.

is the Revised Arab Charter,⁶⁸ which prescribes clawback clauses to many of the rights provided therein, but the ACtHPR made no mention of it. The Vice-President of the Court, in a separate opinion attached to another case, pointed out this problematic issue, but concluded, with no further explanation, that the ACHPR should be interpreted in the same spirit as the ICCPR.⁶⁹

The IACtHR, for its part, does not elaborate on any contextual differences between treaties. The ECtHR is more mindful, although many pertinent issues are still not sufficiently addressed. To summarise, the application of the principle of systemic integration should not be understood as the legal basis for aligning the meaning of a treaty with the content of other treaties. After all, human rights treaties establish a minimum standard for a selective catalogue of rights. In many instances, the ECtHR follows such an intensive integrative and harmonising interpretation of the ECHR with regard to other treaties that it raises questions about the boundary between interpreting and re-writing the ECHR. Mitigating fragmentation does not equate to striving for uniformity. International courts can and should justify different approaches and interpretations, if such decisions are dictated by different contexts.⁷⁰ The ECtHR's great receptiveness to other treaties is not always accompanied by a rigorous examination into how these treaties are relevant to the ECHR.

Other international bodies pursue a more robust analysis of what a relevant rule of PIL is for the purposes of the treaty under interpretation. The Appellate Body of the WTO, in the *Measures Affecting Trade in Large Civil Aircraft* dispute, scrutinised in detail whether other international treaties related closely to the issues under dispute.⁷¹ It found that the provisions of the 1992 Agreement between the EU and the USA concerning the application of the GATT Agreement on Trade in Civil Aircraft to trade in large civil aircraft were not relevant for the purpose of informing the meaning of 'benefit' under Article 1.1(b) of the Agreement on Subsidies and Countervailing Measures under discussion.⁷² The ICJ, in the *Questions of Mutual Assistance* case,

⁶⁸ League of Arab States, Revised Arab Charter on Human Rights (adopted 22 May 2004; entered into force 15 March 2008) reprinted in 12 (2005) Int'l Hum. Rts. Rep. 893.

⁶⁹ Separate Opinion of Vice-President Fatsah Ouguergouz in *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, ACtHPR App Nos 009 & 011/2011 (2013) [29]-[31].

⁷⁰ Higgins (n 14) 799; Webb (n 2) 5.

⁷¹ Report of the Appellate Body, WTO, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011 [845].

⁷² *ibid* [846]-[855]. Also *United States Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998 [130].

accepted that the 1977 Treaty of Friendship and Co-operation between France and Djibouti was relevant and had ‘some bearing’⁷³ on the interpretation of the 1986 Convention on Mutual Assistance in Criminal Matters, although it did not elaborate further. There is, therefore, room for improvement, and international human rights courts should aim in this direction.

C. Indirectly Applying and Supervising Other Treaties

A concern when applying the principle of systemic integration (or Article 31 (3)(c) VCLT with the objective of systemic integration in mind) is the risk of conflating the use of a treaty for the purpose of interpretation and the de facto application of that treaty.⁷⁴ Systemic integration may lead not only to transposing detailed standards into the scope of a human rights treaty, but also to indirectly applying and supervising these standards under the pretext of interpretation. This, in turn, stretches – if not contravenes – the limited *ratione materiae* jurisdiction of an international human rights court.⁷⁵ As will be discussed, both the IACtHR and the ECtHR discern a common denominator in the various relevant treaties by reading them together and subsequently integrate this denominator into the scope of the IACHR and the ECHR respectively. The ECtHR articulates its practice mostly in terms of a European consensus; the IACHR puts forward the international corpus juris, positing that a comprehensive and integrative reading of the IACHR alongside other treaties is justified on multiple grounds, including the *pro homine* principle, Article 29(b) IACHR and Article 31 (3)(c) VCLT.⁷⁶

The *Taşkin* and *Tătar* judgments marked a discernible shift in the ECtHR’s interpretation of the ECHR with respect to the use of other relevant treaties concerning environmental protection.⁷⁷ The consideration of environment-related norms took the

⁷³ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Merits, Judgment, 4 June 2008 [2008] ICJ Rep. 177 [114] (emphasis added).

⁷⁴ Gardiner (n 16) 313.

⁷⁵ Separate Opinion of Judge Vendross in *Golder v United Kingdom*, 21 February 1975 (Plenary). See discussion in Part III.C regarding the exceptional nature of the ACtHPR’s jurisdiction.

⁷⁶ G Neuman, ‘Import, Export and Regional Consent in the Inter-American Court of Human Rights’ (2008) 19 EJIL 101; H Tigroudja, ‘La Cour Interaméricaine des Droits de l’ Homme au Service de l’ “Humanisation du Droit International Public” - Propos Autour des Récents Arrêts et Avis’ (2006) 52 *Annuaire Français de Droit International* 620-1; A Rachovitsa, ‘Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clause in Human Rights Treaties’ (2016) 16 HRLR 77; C Medina, *The American Convention on Human Rights* (Intersentia, 2016) 51-5.

⁷⁷ Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner in *Hatton and others v United Kingdom*, 8 July 2003 (Grand Chamber). T Stephens, *International Courts and Environmental Protection* (CUP, 2009) 320.

form of fully integrating detailed obligations under the Aarhus Convention regarding access to information, public participation in decision-making and access to justice into the positive obligations of Article 8 ECHR. In effect, the Court provided for indirect procedural environmental rights and assessed member states' acts and omissions against these standards.⁷⁸ In a different series of cases concerning children's rights, systemic integration, Article 31 (3) VCLT and the international corpus juris for the protection of the child served as the bases for the IACtHR to establish the content of Article 19 IACHR by incorporating provisions of the CRC.⁷⁹ Although the Court proclaims that the CRC merely throws light on Article 19 IACHR, it does in fact integrate detailed requirements of the CRC.⁸⁰

Even more striking is the ECtHR's practice regarding the Hague Convention on the Civil Aspects of International Child Abduction.⁸¹ Systemic integration provides the means for the Court to transplant technical provisions of the Hague Convention into Article 8 ECHR. In addition to this, the Court held that any weakening of the Hague Convention's guarantees reduces the protection under the ECHR.⁸² National authorities' failure to meet the six-week requirement to reach a decision on the expeditious return of the abducted child (Article 11 of the Hague Convention), or to diligently enforce this decision, *automatically* gives rise to a violation of Article 8 ECHR.⁸³ In this way, the Court effectively supervises the implementation of the Hague Convention under the guise of the ECHR.⁸⁴

⁷⁸ M Fitzmaurice, 'Environmental Degradation' in D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (OUP, 2013) 640.

⁷⁹ 'Street Children' (*Villagran-Morales et al.*) v *Guatemala*, IACtHR Series C 63 (1999) [192], [194]; 'Juvenile Reeducation Institute' v *Paraguay*, IACtHR Series C 112 (2004) [148].

⁸⁰ 'Street Children' [195], [196]; *Gomez-Paquiyaury Brothers v Peru*, IACtHR Series C 110 (2004) [164]–[173]; 'Juvenile Reeducation Institute' [161]–[163], [172], [230]. J Butler, 'The Rights of the Child on the Case Law of the Inter-American Court of Human Rights: Recent Cases' (2005) 5 HRLR 159, 161, 166–7.

⁸¹ Convention on the Civil Aspects of International Child Abduction (concluded 25 October 1980; entered into force 1 December 1983) 1343 UNTS 89 (Hague Convention). *Neulinger and Shuruk v Switzerland*, 6 July 2010 (Grand Chamber) [131]–[132].

⁸² *Monory v Romania and Hungary*, 5 April 2005 [81]. Also *Bianchi v Switzerland*, 22 June 2006 [92]; *Carlson v Switzerland*, 6 November 2008 [73].

⁸³ *Carlson* [76]; *Monory* [81], [79], [85]; *H.N. v Poland*, 13 September 2005 [79]; *Karadžić v Croatia*, 15 December 2005 [59]; *Bianchi* [94]; *P.P. v Poland*, 8 January 2008 [89]. On enforcement issues, see e.g. *H.N.* [80]; *Karadžić* [60]–[61]; *Maire v Portugal*, 26 June 2003 [75]; *Bianchi* [98]; *Lafargue v Romania*, 13 July 2006 [103]. PB Beaumont, 'The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction' (2008) 335 *RdC* 19.

⁸⁴ J Arato, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law' (2012) 37 *Brook. J.Int'l.L.* 353.

International courts have gone so far as to pronounce on member states' failures to honour and implement other treaties. In *Carlson*, Switzerland's actions were 'not in accordance with Article 11 of the Hague Convention'.⁸⁵ In *Fornerón and Daughter*, the IACtHR found that the fact that Argentina did not specifically criminalise the sale of a child in its domestic law 'does not satisfy the provision of Article 35 [CRC]'⁸⁶ and is in dissonance with its obligations under the Optional Protocol of the Convention on the Rights of the Child on the Sale of Children, Child Prosecution and Child Pornography.⁸⁷ In *Rantsev*, the ECtHR found a procedural violation of the right to life because Cyprus had failed to make use of the procedures envisaged in a Mutual Legal Assistance Convention.⁸⁸ The IACtHR decided that states were in violation of their obligation to prosecute and punish those responsible for serious human rights violations under the right to a fair trial and to judicial protection due to the lack of relevant extradition treaties.⁸⁹ In other words, according to the Court, the IACHR specifically binds member states to conclude extradition agreements.

Turning to another area, in *Gonzales Lluy* the IACtHR heard a case concerning the right to health.⁹⁰ Notwithstanding the fact that the IACHR does not provide for the right to health and Article 26 IACHR is merely a commitment to progressive development rather than a recognition of socio-economic rights,⁹¹ the Court decided to uphold the right to health by linking it to the right to personal integrity (and the right to life). In particular, the Court read into the scope of the right to personal integrity the state's obligation to regulate, monitor and supervise the services provided by private healthcare centres.⁹² This link was furnished in light of the interdependence and indivisibility of civil and political rights on the one hand and economic, social and cultural rights on the other – and by taking into consideration a series of international treaties and documents, including the Additional Protocol to the American Convention

⁸⁵ *Carlson* [76].

⁸⁶ *Fornerón and Daughter v Argentina*, IACtHR Series C 242 (2012) [141].

⁸⁷ *ibid* [142].

⁸⁸ *Rantsev v Cyprus and Russia*, 7 January 2010 [241]-[242].

⁸⁹ *Goiburú et al. v Paraguay*, IACtHR Series C 153 (2006) [130]-[132]; *Cantuta v Peru*, IACtHR Series C 162 (2006) [227].

⁹⁰ *Gonzales Lluy et al. v Ecuador*, IACtHR Series C 298 (2015). See also *Suárez Peralta v Ecuador*, IACtHR Series C 261 (2013).

⁹¹ Art 26 (Progressive Development) reads: 'The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires'.

⁹² *Gonzales Lluy et al.* [167].

on Human Rights in the Area of Economic, Social and Cultural Rights,⁹³ the CRC and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹⁴ The ICESCR Committee's General Comments articulating a detailed framework for the requirements of availability, accessibility, acceptability and quality of all health services, goods and facilities qualified as the standard of assessment of Ecuador's obligations under the IACHR.⁹⁵ Although the Court was divided, the point of disagreement among the judges was the scope and nature of Article 26 IACHR and, accordingly, the question of whether the right to health should become justiciable under Article 26 or the rights to life and personal integrity.⁹⁶ The President of the Court attached an insightful concurring opinion to the judgment, arguing that, if one were to define the entire content and scope of a right by means of other treaties, this would result in modifying the IACHR and delegitimising the Court.⁹⁷ What was not addressed, however, was the question of why these concerns are not equally applicable when detailed soft-law and hard-law standards regarding the right to health are fully incorporated under the right to personal integrity.

From the cases discussed, it follows that, although both the ECtHR and the IACtHR argue that other treaties (and instruments) are used as interpretative references in their reasoning, in practice they transplant external standards under the protective scope of their constitutive instruments. The specific application of systemic integration results, in many instances, in the indirect application of other treaties under the pretext of interpretation. States may provide different levels of protection for the same rights in different international treaties, or even strategically create treaty divergences or conflicts.⁹⁸ This does not signify that international judges have the competence to resolve such issues, or to align the content of one treaty with another. In other cases, the Courts effectively supervise other treaties.⁹⁹ This practice stretches their mandates and circumvents the consent of the states that have not ratified these treaties, by

⁹³ (Adopted 17 November 1988; entered into force 16 November 1999) OAS Treaty Series No 69.

⁹⁴ (Adopted 16 December 1966; entered into force 3 January 1976) 993 UNTS 3. *Gonzales Lluy et al.* [172]-[174], [193], [196].

⁹⁵ *ibid* [176], [192]-[193].

⁹⁶ Cf. Concurring Opinion of Judge Humberto Antonio Sierra Porto and Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot (Judges Roberto F Caldas and Manuel E Ventura Robles adhered to this Opinion).

⁹⁷ Concurring Opinion of Judge Humberto Antonio Sierra Porto in *Gonzales Lluy et al.* [1], [4], [7], [31], [32].

⁹⁸ In general, S Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (CUP, 2014).

⁹⁹ Neuman (n 76); Tigroudja (n 76) 622-3; Butler (n 80).

imposing on them obligations that they have not assumed. Even in the scenario that member states (some or all of them) have ratified these treaties, they have not consented to the Courts supervising their implementation. Establishing the content and meaning of the rights provided for under the ECHR and the IACHR by reading into them, not only external detailed obligations, but also arguably new rights, crosses the line between interpreting and modifying human rights treaties.¹⁰⁰

III. SYSTEMIC INTEGRATION: FALLING SHORT OF EXPECTATIONS

Having discussed certain doctrinal (interpretational and jurisdictional) issues that arise when applying systemic integration, this part of the article explores the broader implications of applying systemic integration within the human rights arena. Systemic integration falls short of international lawyers' expectations for reasons which are rarely addressed. The first section highlights the fact that the application of the principle of systemic integration is subject to the institutional and policy preferences of international courts and, hence, there are inherent limitations to pursuing a uniform or consistent interpretation of human rights law. The second section discusses the argument that systemic integration has the potential to establish priorities among important concerns, rather than resolving treaty conflicts. The case law of the ECtHR reveals that when such an exercise takes place, it may upset the aims and structure of the treaty under interpretation. The third section questions the well-established presumption that the more receptive an international court is to other treaties, and the more systemically it integrates them in its reasoning, the more effectively it mitigates fragmentation.¹⁰¹ The analysis addresses the risk that international courts exercise undue interpretative authority over other treaties, thereby leading to the emergence of new informal hegemonies among international courts. The final section argues that systemic integration in the human rights regime may hinder the progressive development of other interests and concerns under PIL and cause our imaginative space to become stagnated, preventing us from looking beyond the human rights regime(s).

¹⁰⁰ O Ruiz Chiriboga, 'The American Convention and the Protocol of San Salvador: Two Intertwined Treaties. Non-enforceability of Economic, Social and Cultural Rights in the Inter-American System' (2011) 31 NQHR 172.

¹⁰¹ Forowicz (n 13) 21; cf. S McInerney-Lankford, 'Fragmentation of International Law Redux: The Case of Strasbourg' (2012) 32 OJLS 623.

A. Systemic Integration is Shaped by Institutional Preferences

The principle of systemic integration does not escape the functional biases and preferences of international courts. The application of systemic integration is subject to the legal and institutional aspects of fragmentation that it purports to overcome in the first place. Interpretation is, therefore, an invaluable – but limited – tool for international lawyers and judges.

Debates in the literature usually revolve around the question of whether the introduction of relevant treaties in the process of interpretation could promote, for example, the receptiveness of an investment arbitration tribunal or a WTO Panel to human rights law and, hence, ground a holistic construal of different areas of law.¹⁰² An interesting exercise that demonstrates the intrinsic difficulties involved is to adopt a narrower frame of reference and explore how international courts in the same area of law are restricted not only by the mandate defined by their subject area (e.g. human rights, trade) but also by their own judicial policies and preferences. Systemic integration as a policy goal and/or interpretation tool does not necessarily mitigate these preferences and biases, nor does it bring coherence to a specific area of PIL – let alone PIL as a whole.

For instance, the IACtHR and the ECtHR are not equally willing to take indigenous peoples' rights into account when interpreting the IACHR and the ECHR respectively. The IACtHR has enlarged the scope of Article 21 IACHR by reading into it a collective understanding of the right to property in accordance with Article 13 of ILO Convention No 169 regarding the duty of state parties to respect the special relationship that indigenous peoples develop with the lands that they occupy or use.¹⁰³ According to the Court, a comprehensive and integrative reading of the IACHR alongside other treaties is required in order to promote the uniform interpretation of international human rights law.¹⁰⁴ This 'effort of normative integration'¹⁰⁵ serves the

¹⁰² E.g. E de Wet and J Vidmar, 'Conflicts Between International Paradigms: Hierarchy versus Systemic Integration', 2013, 23 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269703>.

¹⁰³ *Yakye Axa Indigenous Community v Paraguay*, IACtHR Series C 125 (2005) [124]-[129], [136]-[137], [149]-[151]; *Sawhoyamaya Indigenous Community v Paraguay*, IACtHR Series C 146 (2006) [117]-[121], [134]-[141].

¹⁰⁴ E.g. *Yakye Axa Indigenous Community* [151]; Separate Opinion of Judge Cançado-Trindade in *Caesar v Trinidad and Tobago*, IACtHR Series C 123 (2005) [62]-[63].

¹⁰⁵ Concurring Opinion of Judge Poissot in *Liakat Ali Alibux v Suriname*, IACtHR Series C 276 (2014) [74].

aim of incorporating the indigenous world view into human rights.¹⁰⁶ However, the ECtHR does not share the same degree of sympathy for indigenous peoples' rights. In the *Handölsdalen Sami Village* case, the Court did not address how indigenous peoples' rights and the relevant treaties could inform the ECHR's interpretation.¹⁰⁷ This point demonstrates not only the different approaches taken by the Courts, but also the selectiveness underlying the application of systemic integration. The IACtHR uses systemic integration and the pro homine interpretation to construe the corpus juris of international human rights law with the aim of serving specific judicial policy goals in the Latin American region.¹⁰⁸ Consequently, any claim for a uniform interpretation of human rights or the use of integration is subject to (and even reinforces) existing biases and judicial policies. In addition, institutional preferences and structural biases permeate the human rights expertise from within, since human rights lawyers may regard themselves as experts in very specific areas (for example, children's or anti-discrimination lawyers) and, therefore, adopt opposing perspectives and priorities.¹⁰⁹ These preferences and biases on an institutional, judicial policy and expertise level are entrenched into the practice of human rights; at the very least, one should be aware of them.

B. Prioritising Concerns Beyond Treaty Conflicts?

The principle of systemic integration holds a prominent position in discussions of treaty (or norm) conflicts. Although many scholars have acknowledged that Article 31 (3)(c) VCLT is not equipped to resolve true treaty conflicts,¹¹⁰ the ILC assigns such a role to the provision in its alleged capacity as an expression of the principle of systemic integration. Furthermore, it has been argued that the principle of systemic integration offers the prospect of balancing different values and interests without necessarily predicated or establishing the prevalence of one norm over another.¹¹¹ The

¹⁰⁶ Joint Separate Opinion of Judges Cançado-Trindade, Pacheco Gomez and Abreu Burelli in *Mayanga (Sumo) Awas Tingi Community v Nicaragua*, IACtHR Series C 79 (2001) [13].

¹⁰⁷ *Handölsdalen Sami Village and Others v Sweden*, 30 March 2010. This is despite the strong objections raised by Judge Ziemele in her separate opinion.

¹⁰⁸ Neuman (n 76); A Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' in HP Aust and G Nolte (eds), *The Interpretation of International Law by Domestic Courts* (OUP, 2016) 153.

¹⁰⁹ M Payandeh, 'Fragmentation within International Human Rights Law' in M Andenas and E Bjorge (eds), *A Farewell to Fragmentation* (CUP, 2015) 297.

¹¹⁰ McLachlan (n 13) 318-9; Tzevelekos (n 14) 665-670, 686. M Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009-2010) 20 *Duke J. of Comp. & Int'l L.* 69.

¹¹¹ McLachlan (n 13) 318-9.

interpreter has a role in ‘prioritiz[ing] concerns that are more important at the cost of less important objectives’.¹¹² These claims have not been elaborated on, but a few points need to be underlined in light of ongoing judicial practice. First, the task of balancing values or interests is different to prioritising them; prioritising is but one option. Second, as will be discussed below, it is doubtful whether the balancing of interests and values vis-à-vis treaty provisions can be addressed within the realm of interpretation.¹¹³ Third, it is unclear how one can decide which concerns are most important and prioritise them accordingly; this is an exercise that is dependent on the interpreter’s standpoint.

For its part, the IACtHR does not seem inclined towards considering, let alone prioritising, interests and values reflected by other treaties unless these interests are perfectly aligned to the aims of the IACHR. To take an example, the Court was firm in its position that a bilateral investment treaty between Paraguay and Germany had no legal bearing in assessing whether a series of rights, including the right to property, of the Sawhoyamaya community under the IACHR had been violated.¹¹⁴ In a similar vein, in the *Wong Ho Wing v Peru* case, the bilateral extradition treaty between Peru and China was largely treated as a fact under domestic law, rather than as an international treaty to be considered in the process of interpreting and applying the right to life under the IACHR.¹¹⁵ In other words, the general interest of international cooperation in the specific area of extradition did not have any bearing. Finally, in assessing the compatibility of El Salvador’s amnesty law with the IACHR, the Court stated that it would take the 1992 Peace Accord and Additional Protocol II to the 1949 Geneva Conventions (AP II) into account.¹¹⁶ In this instance, there seemed to be a discrepancy between, on the one hand, the requirement of the AP II to grant the broadest possible amnesties and the need to maintain the negotiated peace,¹¹⁷ and, on the other, the Court’s inflexible approach in declaring all amnesty laws to be incompatible with the

¹¹² ILC Rep (n 2) [419].

¹¹³ Gardiner (n 16) 281.

¹¹⁴ *Sawhoyamaya Indigenous Community* [140].

¹¹⁵ *Wong Ho Wing v Peru*, IACtHR Series C 297 (2015) [126], [138], [239]; cf. *Soering v United Kingdom*, 7 July 1989 (Plenary) [83]-[90].

¹¹⁶ *Massacres of El Mozote and Nearby Places v El Salvador*, IACtHR Series C 252 (2012) [284]-[287].

¹¹⁷ Concurring Opinion by the President of the Court, Judge García-Sayán in *Massacres of El Mozote*.

IACHR.¹¹⁸ The Court did not enter this discussion, and reiterated its general position – declaring El Salvador’s amnesty law inconsistent with the guarantees of the IACHR.¹¹⁹

On the other side of the spectrum, the ECtHR is willing not only to balance external concerns and interests against the guarantees of the ECHR, but also to prioritise the former over the latter. In many instances, the ECtHR took other treaties (or the lack thereof) into account, but did not proceed to resolve (or avoid) a norm conflict. It arguably prioritised the admittedly weighty interests reflected by these treaties under PIL over the applicability and application of the ECHR. This had a significantly restrictive impact on the protective scope of the rights in question. In *Carson*, the Grand Chamber accepted that the *absence* of bilateral reciprocal treaties in the social security sphere is a sufficient reason to limit the applicability of Article 14 ECHR; otherwise, the application of Article 14 ECHR would effectively undermine the right of states to enter into reciprocal agreements.¹²⁰ In *Waite and Kennedy*, the Plenary Court held that the right to access a court should be substantially restricted so as not to undermine the proper functioning of international organisations and international cooperation.¹²¹ In *Bosphorus*, the Court established the presumption of equivalent or comparable protection between EU law and the ECHR by relying upon the principle of *pacta sunt servanda* and the need for the proper functioning of international organisations (Ireland’s EU membership).¹²²

A cluster of cases concerning the Hague Convention on Child Abduction also illustrates that prioritising the purposes and goals of other treaties may interfere with the aims, structure and effectiveness of the ECHR. The applicants before the ECtHR claimed that returning the child pursuant to the Hague Convention would be in violation of the best interests of the child and the right to family life under Article 8 ECHR. The Court would not rigorously review whether the return of the child was in breach of the guarantees of Article 8 ECHR unless there was an arbitrary decision by national authorities.¹²³ The crux of these cases was that Article 13 (b) of the Hague Convention

¹¹⁸ JM Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, CUP, 2014) 218-9, 322-3; Neuman (n 76) 108-9.

¹¹⁹ For criticism to the Court’s practice see L Mallinder, ‘The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America’s Amnesty Laws’ (2016) 65 ICLQ 660-1.

¹²⁰ *Carson and others v United Kingdom*, 16 March 2010 (Grand Chamber) [89].

¹²¹ *Waite and Kennedy v Germany*, 18 February 1999 (Grand Chamber) [63].

¹²² *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland*, 30 June 2005 (Grand Chamber) [150].

¹²³ *Maumousseau and Washington v France*, 6 December 2007 [71]; cf. Dissenting Opinion of Judge Zupančič joined by Judge Gyulumyan, 39-40. *Eskinazi and Chelouche v Turkey*, 6 December 2005, 21-

envisages an exception to the state parties' obligation to return the child if there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation. The Court's standing case law, to apply the Hague Convention's provisions de facto via the ECHR,¹²⁴ and the importance attached to preserving the *main aim* of the Convention (the expeditious return of the child) created the uncomfortable situation whereby the Court was obliged to review the Hague Convention against the ECHR.¹²⁵ On the one hand, Article 13 (b) of the Hague Convention is an exceptional 'escape clause' to the return of the child, and has to be narrowly interpreted, whereas, on the other hand, the protection of the best interests and rights of the child serve as primary considerations under Article 8 ECHR, which, in turn, may be subject to restrictions. The ECtHR was hesitant to review the application of the Hague Convention against the guarantees of Article 8 ECHR in light of the risk of undermining the effective implementation of the Hague Convention.¹²⁶ The Grand Chamber, in *Neulinger and Shuruk*, restored this imbalance, ruling that the conditions for the enforcement of the return of the child need to be in strict conformity with Article 8 ECHR.¹²⁷

Consequently, the IACtHR and ECtHR have different approaches in this instance. The IACtHR appears to be fixed in its position of giving little weight to the values and interests of other treaties, unless these converge with the aims and effectiveness of the IACHR. Some scholars have argued that this practice can be rigid and one-sided on certain occasions, especially when discussing amnesty laws. The ECtHR employs systemic integration in order to justify the prioritisation of significant interests over the ECHR as an issue of legal methodology. The foregoing cases demonstrate that the argument that systemic integration is a means of balancing or even prioritising among other important interests can lead to significant restrictions of human rights guarantees.

2. E Stoecker, 'International Child Abduction and Children's Rights: Two Means to the Same End' (2011) 32 Michigan JIL 521-2.

¹²⁴ Cf. discussion in Part II.C.

¹²⁵ *Maumousseau and Washington* [73]; cf. Dissenting Opinion of Judge Spielmann in *Neulinger and Shuruk*, 8 January 2009 41; Dissenting Opinion of Judge Dedov in *Adžić v Croatia*, 12 March 2015, 27-9.

¹²⁶ *Neulinger and Shuruk* [134], [137], [145]. Also Concurring Opinion of Judge Lorenzen joined by Judge Kalaydjieva, 54; Concurring Opinion of Judge Cabral Barreto, 56; Concurring Opinion of Judge Malinverni, 57; Joint Separate Opinion of Judges Jočienė, Sajó and Tsotsoria, 61-2.

¹²⁷ *Neulinger and Shuruk* [132]-[133], [138]-[141]; *X. v Latvia*, 26 November 2013 (Grand Chamber) [94], [106].

C. Exercising Undue Interpretative Authority over Other Treaties

An international court's receptiveness to relevant PIL rules can be a reliable indicator of a reduced risk of diverging interpretations and/or judgments, as well as bolstering cross-fertilisation.¹²⁸ At the same time, however, an international court's systematic engagement with, and integration of, other treaties raises questions regarding its authority to shape the construal of these treaties. When an international court takes a treaty provision into account for interpretation purposes, it inevitably engages in an articulation of its ordinary meaning.¹²⁹ While international courts have the inherent power to construe general international law, they do not have the competence to *authoritatively* ascertain the ordinary meaning of treaties other than the instruments subject to their jurisdiction.

An exceptional instance is the African Court of Human and Peoples' Rights. Article 3 (1) of the Protocol establishing the ACtHPR provides that '[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol *and any other relevant Human Rights instrument ratified by the States concerned*'.¹³⁰ Pursuant to this wide jurisdiction, the Court has indeed interpreted, applied and, accordingly, found a violation of, for example, the ICCPR¹³¹ or the Revised ECOWAS treaty.¹³² Yet, even in light of the exceptional scope of the ACtHPR's competence, concerns regarding the potential for undue interpretative authority over other treaties are not mitigated. Such concerns relate, obviously, to the risk of divergent interpretations of a treaty which is already supervised by another body. The Vice-President of the ACtHPR underlined this risk in his separate opinion in the *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* case.¹³³

¹²⁸ Forowicz (n 13).

¹²⁹ T Broude, 'Fragmentation(s) of International Law: On Normative Integration as Authority Allocation' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law* (Hart Publishing, 2008) 112; Samson (n 14) 708-9.

¹³⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 11 July 2003; entered into force 24 January 2014) OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (emphases added); F Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP, 2012) 435-9.

¹³¹ E.g. *Mohamed Abubakari v United Republic of Tanzania*, ACtHPR App No 007/2013 (2016) [145].

¹³² Economic Community of West African States (ECOWAS) Revised Treaty (adopted 24 July 1993; entered into force 23 August 1995) 2373 UNTS 233. E.g. *Lohe Issa Konate* [164], [176].

¹³³ Separate Opinion of Vice-President Fatsah Ouguergouz in *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* [16].

Nonetheless, these concerns are also manifested (and merit equal consideration) in instances in which a treaty is not subject to supervision by an international body and/or the interpretation of one of its provisions is contested or unclear.¹³⁴ The WTO Appellate Body¹³⁵ and international investment tribunals tend to engage only very reluctantly with the interpretation of other treaties.¹³⁶ Human rights courts, however, show no signs of hesitance in this regard.

The *X and others* case¹³⁷ serves as a good example of a Grand Chamber divided over the ordinary meaning of the European Convention on the Adoption of Children.¹³⁸ Seven dissenting judges strongly opined that the majority's interpretation adhered neither to the letter nor to the object and purpose of Article 7 of the said Convention.¹³⁹ Moreover, the ECtHR defines the ordinary meaning of debated provisions of the Hague Convention and corrects the (alleged) shortcomings of national courts' decisions when applying the Hague Convention.¹⁴⁰ Judge Pinto De Albuquerque argued that, in the absence of an oversight body for the Hague Convention, the ECtHR should ensure the uniformity of the interpretation and implementation of states' obligations under the Hague Convention.¹⁴¹ The IACtHR, in *Artavia Murillo*, engaged extensively with many human rights treaties and it is arguable that in the process of doing so it pursued an inappropriate interpretation of the CRC and the ICCPR.¹⁴² The Court read and adopted a specific interpretation of the right to life under these treaties that does not necessarily reflect their ordinary meaning or the current views of their supervisory bodies.¹⁴³ Such instances may be somewhat exceptional (thus far) but they are arguably symptomatic of future trends.¹⁴⁴ The questions that come to the surface, but are rarely discussed in literature and judicial practice, are the following: Are international courts entitled to have a say on the interpretation of other treaties? If so, what are the implications for the

¹³⁴ *Enerji Yapi-Yol Sen and Danilenkov and Others* cases; Velyvyte (n 51) 80.

¹³⁵ L Bartels, 'Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case Before It?' in Broude and Shany (n 41) 140-1.

¹³⁶ M Hirsch, 'The Interaction Between International Investment Law and Human Rights Treaties: A Sociological Perspective?' in Broude and Shany (n 41) 216-7.

¹³⁷ Samson (n 14) 708-9.

¹³⁸ 2008 European Convention on the Adoption of Children (Revised), CETS No 202.

¹³⁹ Joint Partly Dissenting Opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos in *X and others v Austria*, 19 February 2013 (Grand Chamber) [19].

¹⁴⁰ *Monory* [81]; *Bianchi* [92].

¹⁴¹ Cf. Concurring Opinion of Judge Pinto De Albuquerque in *X v Latvia* 44.

¹⁴² Jesús (n 37) 258-262.

¹⁴³ *ibid* 254-5.

¹⁴⁴ L Silberman, 'Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence' Institute of International Law and Justice (New York University, School of Law), Working Paper 2005/5, 32 at <www.iilj.org>.

development of international law, and what is the role that these courts assume?

In general, all international courts are equal participants in the development of PIL, including general international law (international customary law and general principles of law) and treaties.¹⁴⁵ As far as treaties are concerned, international courts frequently refer to and use them as interpretative aids. When doing so, they make sure to approach the authoritative meaning of a treaty provision by relying on how its interpretation has been developed by the respective supervisory body. If a treaty lacks a monitoring body, it is the state parties to this treaty that ascribe authoritative interpretations. Yet, it would be unreasonable to question altogether the authority of international courts and bodies to interpret another treaty, should such an issue arise when deciding a case. Their interpretations may not be authoritative, but they do enjoy a *certain* authority.¹⁴⁶

The weight of this authority is determined by how an international court ascertains the ordinary meaning of a treaty provision. In the Hague Abduction cases discussed above, the only source that the ECtHR employed as an interpretative aid to support its findings was the 1980 Explanatory Report on the Hague Convention.¹⁴⁷ It is only after the use of the Hague Convention became contested that the Court employed additional and more recent resources to interpret the Hague Convention.¹⁴⁸ Although the practice of national authorities (primarily courts) of member states to the Hague Convention is critical in the sense that it is genuinely authoritative, the ECtHR is not rigorous in identifying and analysing such practice.¹⁴⁹ The ECtHR in *Monory* invoked the practice of *European* states, although the treaty is widely ratified on a global level by 94 states¹⁵⁰ and, if one reads through the references in *Monory*, the Court essentially cites the practice of one European state! In *Neulinger and Shuruk*, the ECtHR looked selectively into the practice of certain European and Australian domestic courts.¹⁵¹ Conversely, the weight of the authority of an interpretation by the ECtHR will subsequently be tested against the practice of member states with respect to this other

¹⁴⁵ E.g. AAC Trindade, 'The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights' (2004) 25 HRLJ 158.

¹⁴⁶ Gardiner (n 16).

¹⁴⁷ *Maumousseau and Washington* [43]; *Neulinger and Shuruk* [58]; *X. v Latvia* [45]; *Adžić* [63].

¹⁴⁸ *Neulinger and Shuruk* [67]; *X. v Latvia* [36]; *Adžić* [64]-[65].

¹⁴⁹ Cf. the detailed analysis of the US Supreme Court in similar cases discussed in A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 86.

¹⁵⁰ *Monory* [76].

¹⁵¹ *Neulinger and Shuruk* [60]-[74].

treaty. This means that, for instance, the ECHR member states can, in theory, dismiss the ECtHR's findings (as to the interpretation of the Hague Convention); this, however, would put them in a difficult position since they have to conform to the Court's judgments.

The increasing receptiveness of an international court to relevant treaties, if accompanied by an integrative interpretation, raises questions not only on the level of interpretation but also regarding the role that the court assumes in asserting authority over other treaties.¹⁵⁶ There is the risk of establishing novel, informal hierarchies among international courts on the basis of who exercises and concentrates persuasive interpretative and normative power when construing certain treaties. One could not fail to note that the fragmentation discussion has unfolded as a critique against (or in favour of) sustaining formal or informal hierarchies among international courts. The perception that the multiplicity of international courts poses a danger to the unity of PIL partly reflects the hegemonic conflict stemming from the 'loss of hierarchical position by institutions of the *ancien régime*'¹⁵⁷ (referring mostly to the role of the International Court of Justice). In this context, other international courts are not exempt from the same note of caution. Why should one presume that the ECtHR or the IACtHR are immune to establishing new forms of informal hegemonies?¹⁵⁸ It is important to be mindful that shared ownership over international law goes hand in hand with the burden of shared responsibility for developing international law and managing international dispute settlement.¹⁵⁹ Shared responsibility is not restricted to drafting treaty clauses for regulating overlapping jurisdiction, applying procedural principles or exercising judicial comity.¹⁶⁰ In the everyday operation of international courts, international lawyers and judges need to be aware of the systemic implications of their judgments in order to avoid exercising undue authority over other treaties. Creativity does not preclude prudence. International courts should conduct more rigorous research on a comparative and international level, and they should enhance the quality of judicial

¹⁵⁶ Broude (n 133) 112.

¹⁵⁷ M Koskeniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought' (Harvard, 5 March 2005), 6 <<http://www.helsinki.fi/eci/Publications/Koskeniemi/MKPluralism-Harvard-05d%5B1%5D.pdf>>; cf. T Treves, 'Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals' (2000) 4 Max Planck YbkUNL 221.

¹⁵⁸ Cullen (n 55) 93.

¹⁵⁹ B Simma, 'Universality from the Perspective of a Practitioner' (2009) 20 EJIL 266.

¹⁶⁰ K Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' (2001) 5 Max Planck YbkUNL 88-90.

reasoning and methodology, especially when interpreting a treaty that does not fall within their jurisdiction.¹⁶¹

Finally, an argument that is often raised is that certain international courts may present the only viable opportunity to meaningfully develop a given international treaty which lacks an implementation mechanism. The IACtHR used this reasoning as a basis not only for taking other treaties into account, but also for exercising jurisdiction over the Inter-American Convention to Prevent and Punish Torture,¹⁶² despite the fact that it is unclear whether this Convention assigns this task to the Court.¹⁶³ Although such an argument could be somewhat understandable given the shortcomings of the international judicial system, it is tenuous for two reasons.¹⁶⁶ First, this argument disregards the pivotal role that domestic courts can play in the determination and development of international law and treaties. National courts serve the role of providing accessible justice on a daily basis.¹⁶⁷ There is evidence to indicate that domestic courts increasingly engage with questions of international law, employ complex interpretative principles (including systemic integration) and come up with original decisions.¹⁶⁸ This is not to say that innovative approaches in international litigation are not needed. Rather, the point is that we should not wait for domestic remedies to be exhausted in order to pursue international justice.¹⁶⁹ We should treat the national judge as an agent of international justice as well. This is all the more pertinent since the national judge is in a unique position to apply the principle of systemic integration without being confined by the limited jurisdiction of an international court.¹⁷⁰

The second reason that the systematic and integrative approach of international courts towards other treaties is problematic is its repercussions for their legitimacy and

¹⁶¹ In the case of the ACtHPR, this is the case even when a relevant human rights treaty falls under its jurisdiction!

¹⁶² (Concluded 9 December 1985; entered into force 28 February 1987) OAS Treaty Series No 67.

¹⁶³ 'Street Children' [248]. According to Art 8 '[a]fter all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State'.

¹⁶⁶ A third reason is obviously the jurisdictional confines of an international court. See discussion in Part II.

¹⁶⁷ A Roberts et al., 'Comparative International Law: Framing the Field' (2015) 109 AJIL 472-4.

¹⁶⁸ E.g. A Nollkaemper, *National Courts and International Rule of Law* (OUP, 2012) 264-276; Rodiles (n 108) 161-8; HP Aust, A Rodiles and P Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 LJIL 92-100.

¹⁶⁹ Cf. D Shelton, 'Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk' (2015) 6 Journal of Human Rights and the Environment 141.

¹⁷⁰ Rachovitsa (n 76) 96-100.

the overall effectiveness of human rights.¹⁷¹ There are growing concerns among member states to the ECHR regarding the ECtHR's practice of uncritically applying the principle of systemic integration. The lack of transparent legal reasoning and foreseeability in the case law, as well as the states' unwillingness to transform, de facto, the ECtHR into a supervisory mechanism for other treaty obligations, have led to a series of incongruous preliminary objections *ratione materiae*. Moldova, in *Tănase*, strongly argued that the Court should not have used the European Convention on Nationality¹⁷² in order to construe the ECHR, and that the weight attached to the said Convention was inappropriate.¹⁷³ Turkey, in *Demir and Baykara*, objected to the integration of ILO conventions under the scope of Article 11 ECHR.¹⁷⁴ Similarly, the United Kingdom, in *National Union of Rail, Maritime and Transport Workers*, opposed the interpretative relevance of the legal assessments of the European Committee on Social Rights and the ILO Committee of Experts to the interpretation of Article 11 ECHR.¹⁷⁵ From the other side of the Atlantic, member states to the IACHR have also started to show signs of unease. Paraguay, in the '*Juvenile Reeducation Institute*' case, contested the idea that socio-economic rights can be read into the scope of Article 26 IACHR.¹⁷⁶ In *Acevedo Buendía*, Peru raised a preliminary objection arguing that an alleged violation of the right to social security falls outside the Court's competence.¹⁷⁷ Against this background, the current president of the IACtHR and various scholars caution that the IACtHR's practice of strongly pursuing a pro homine interpretation of the IACHR by applying systemic integration will delegitimise the Court and undermine the progress achieved.¹⁷⁸

¹⁷¹ Rodiles (n 108) 163.

¹⁷² European Convention on Nationality (concluded 6 November 1997; entered into force 1 March 2000) ETS No 166.

¹⁷³ *Tănase v Moldova*, 27 April 2010 (Grand Chamber) [36]–[39], [124], [135]–[8], [176].

¹⁷⁴ *Demir and Baykara* [137].

¹⁷⁵ *National Union of Rail, Maritime and Transport Workers* [69], [94]–[98].

¹⁷⁶ '*Juvenile Reeducation Institute*' [254].

¹⁷⁷ *Acevedo Buendía et al. ('Discharged and Retired Employees of the Comptroller') v Peru*, IACtHR Series C 198 (2009) [12]–[19]. See also *Velásquez Paiz et al. v Guatemala*, IACtHR Series C 307 (2015) (only in Spanish) [16]–[19]; *Espinoza González v Peru*, IACtHR Series C 295 (2015) (only in Spanish) [18]–[19].

¹⁷⁸ Concurring Opinion of Judge Humberto Antonio Sierra Porto in *Gonzales Lluy et al.* [23]–[32]; Rodiles (n 108) 161–2; Neuman (n 76); C Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' 12 (2011) GLJ 1208, 1227–8.

D. Does Systemic Integration in the Human Rights Regime Limit the Potential of International Law?

The role that international courts assume and their perception of the interpretation task are significant to the development of PIL. Georges Abi-Saab's metaphor of international law as a parasitic plant that grows erratically by seizing on all opportunities and latching onto anything that offers the possibility of moving towards the light¹⁷⁹ makes one quick to ascribe only weaknesses to the development of PIL and disregard the qualities of diversity and the richness encapsulated precisely in the absence of a centralised legislative and judicial authority. PIL, despite its sophistication, widening and thickening in recent years, holds more firmly than ever to its archaic tendency to grow erratically. In an effort to look into PIL in an orderly way – with a vision and a goal to bring together and integrate all the disparate elements of the system into a single coherent story – international courts should be mindful of the unintended implications. The *uncritical* application of the principle of systemic integration, especially in the context of (and by) international human rights law, may narrow the existing and potential reach of PIL by *reducing* various concerns and interests to the human rights paradigm.

An exemplary case concerns the integration of environmental norms into the scope of the ECHR, which brought about the long-awaited integration of environmental concerns into the human rights discourse.¹⁸⁰ This is, in principle, a positive development. Few note, however, the now-prevailing individualistic perspective towards the environment, and fewer still recognise that the concept of the environment as a public good, indispensable for the life and welfare of society as a whole, is being reduced to a restricted set of individual rights of a procedural character.¹⁸¹ Neither the European nor the Inter-American Courts of Human Rights addresses the ecological approach to the environment, nor do they appreciate environmental integrity and degradation as values for the community per se.¹⁸² This narrow approach has important legal consequences: environmental damage can only be translated into the violation of

¹⁷⁹ G Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' 31 (1998-1999) N.Y.U. J. Int'l L. & Pol. 930-1.

¹⁸⁰ E.g. A Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP, 1996) 52; Stephens (n 77) 320.

¹⁸¹ F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 EJIL 41.

¹⁸² *ibid* 50; Shelton (n 169) 145, 154.

a human right;¹⁸³ the victim requirement as an admissibility condition before international courts is not informed by the collective dimension of environmental integrity; and assessment of environmental regulations introduced by states is confined to the potential limitations to human rights.¹⁸⁴ It could be argued that other regimes and approaches mitigate the shortcomings entrenched in human rights discourse and practice. Yet such an argument disregards the fact that the practice of international human rights courts and bodies is disproportionately influential and, hence, it is highly likely that the ‘narrowest but strongest argument for a human right to the environment’¹⁸⁵ will survive and become mainstreamed into the future development of international law, hindering its potential evolution in different directions.¹⁸⁶

Similar considerations apply to other areas and concerns under PIL. It is unclear to what extent human rights treaties – even in light of the integrative and ground-breaking jurisprudence of the IACtHR – are structurally equipped to include and articulate indigenous understandings of ownership.¹⁸⁷ It is clear that the IACtHR has not acknowledged indigenous people, as a collective group, as the right-holders under the IACHR, but rather as individual members of the community.¹⁸⁸ Neither does the systemic integration approach of the IACtHR give due regard to the potential of the UN Declaration on the Rights of Indigenous Peoples.¹⁸⁹ The IACtHR made a choice – one that was never acknowledged – between the ILO Conventions and the UN Declaration, which sets more demanding standards, more difficult to reconcile with those of the IACHR.¹⁹⁰ Equally concerning is the integration of socio-economic rights into the discourse of civil and political human rights, insofar as we might question whether it is reasonable to expect that the imbalance of power in labour relations and in the complex area of social rights can and should be mediated through the ECHR or the IACHR. In the same vein, the language of human rights is (to some extent) ill suited to describe

¹⁸³ D Shelton, ‘Developing Substantive Environmental Rights’ (2010) 1 *Journal of Human Rights and the Environment* 90.

¹⁸⁴ R Desgagne, ‘Integrating Environmental Values into the European Convention on Human Rights’ (1995) 89 *AJIL* 264, 280-5.

¹⁸⁵ Boyle (n 180) 59-60.

¹⁸⁶ A Grear, ‘Editorial – Where Discourses Meet’ (2010) 1 *Journal of Human Rights and the Environment* 1; C Gearty, ‘Do Human Rights Help or Hinder Environmental Protection?’ (2010) 1 *Journal of Human Rights and the Environment* 7. For similar thoughts, albeit in a different context, see Webb (n 2) 149, 209.

¹⁸⁷ M Koskeniemi, ‘Letter to the Editors of the Symposium’ (1999) 93 *AJIL* 357-9.

¹⁸⁸ Medina (n 76) 5.

¹⁸⁹ UNGA Res 61/295 (2 October 2007) UN Doc A/RES/61/295.

¹⁹⁰ C Charters, ‘Multi-Sourced Equivalent Norms and the Legitimacy of Indigenous Peoples’ Rights under International Law’ in Broude and Shany (n 41) 315.

how corruption causes harm to socio-economic rights,¹⁹¹ or to acknowledge the effects of systemic discrimination and stigmatisation.¹⁹² In addition, despite the significant contribution of human rights courts and bodies to the recognition of domestic violence as a human rights issue, there are limits to how far human rights law can go to protect individuals from violations occurring in the private sphere.¹⁹³ Another topical question is whether international human rights law is capable of articulating and remedying the contemporary refugee crisis.¹⁹⁴ And then there is the issue of protecting human rights online. International human rights law is currently attempting to grasp the concerns pertinent in the digital environment in legal form.¹⁹⁵ To what extent, however, will the human rights paradigm recognise the complex and distinctive interrelation of network/national/individual security and privacy online? In the online environment, privacy and aspects of security can be in both a symbiotic and an antithetical relationship,¹⁹⁶ and privacy can be a strong prerequisite for exercising freedom of expression. Nonetheless, according to the structure of human rights law, it is not possible to protect privacy and freedom of expression at the same time; instead, one can only be assessed as a legitimate restriction on the other. How will this dynamic relationship be incorporated into, and inform, legal reasoning and the proportionality test?¹⁹⁷

The foregoing points do not aim to understate the relevance and significance of the human rights approach to other interests and concerns. Pursuing systemic integration within the human rights arena may lead to progressive developments in PIL and enrich

¹⁹¹ C Rose, 'The Limitations of a Human Rights Approach to Corruption' (2016) 65 ICLQ 405.

¹⁹² *Garib v The Netherlands*, 23 February 2016; cf. Joint Dissenting Opinion of Judges López Guerra and Keller. See L Lavrysen, 'Strasbourg Court fails to acknowledge discrimination and stigmatization of persons living in poverty', 10 March 2016 <<http://strasbourgobservers.com/2016/03/10/strasbourg-court-fails-to-acknowledge-discrimination-and-stigmatization-of-persons-living-in-poverty/>>.

¹⁹³ RJA McQuigg, 'Domestic Violence as a Human Rights Issue: Rumor v. Italy' (2015) 26 EJIL 1024.

¹⁹⁴ The Chamber of the Strasbourg Court upheld its strong record of protecting refugees and asylum seekers from collective expulsions; see *Khlaifia and Others v Italy*, 1 September 2015. However, it is alarming that, upon referral of the case to the Grand Chamber, the Chamber's judgment as to the violation of the prohibition of collective expulsion of aliens was overturned. The Grand Chamber does not seem to grasp either the legal or the pragmatic challenges of the refugee crisis; *Khlaifia and Others v Italy*, 15 December 2016 (Grand Chamber).

¹⁹⁵ UNGA Res 68/167, 'The Right to Privacy in the Digital Age' (21 January 2014) UN Doc A/RES/68/167 (adopted without a vote); UN HRC Res 32/13, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' (18 July 2016) UN Doc A/HRC/RES/32/13 (adopted without a vote as orally revised).

¹⁹⁶ Report of the Special Rapporteur on the Right to Privacy, JA Cannataci, UN Doc A/HRC/31/64, 8 March 2016 [24]-[25].

¹⁹⁷ See pending case before the ECtHR *Bureau of Investigative Journalism and Alice Ross v United Kingdom* (case communicated on 5 January 2015), App No 62322/14.

the human rights discourse while adding value to, and highlighting, new interests. However, one should question whether we should settle for the strongest arguments, which in practice seem to be the easiest arguments to make. Human rights are simultaneously part of the solution and the problem; its well-established and powerful – doctrinal and rhetorical – vocabulary dominates the imaginative scope of international law and overshadows other articulations.¹⁹⁸ In this context, the principle of systemic integration arguably tends to accelerate and intensify this process: the human rights paradigm does not only overshadow but also subsumes other emerging areas of, and concerns in, law by “squeezing” them into its own vocabulary, aims, structure and scope. Aspects of these interests that are not readily reducible to human rights needs remain embryonic or fall between the cracks.¹⁹⁹ In this sense, international law’s store of available words and possible future meanings is being constrained and impoverished.²⁰⁰ Progress and stagnation stand on opposite sides of a very fine line.²⁰¹ mitigating fragmentation and ensuring consistency should not impede the progressive development of PIL in pursuit of more radical and imaginative changes, even if this means that the available narratives become less coherent.

It needs to be underscored that this is a process familiar in many quarters of international law and practice: other areas and regimes may raise similar questions when engaging with other treaties and concerns. It is also true that, in general, human rights law shapes and, in turn, is shaped by other fields and norms in a dynamic and non-linear fashion.²⁰² The present discussion, however, shifts the debate from the conventional focus on interactions among well-known regimes (or the interactions of regimes vis-à-vis general international law) to how the human rights paradigm develops and/or inhibits the legal articulation of numerous other interests under PIL. Applying systemic integration arguably has a unique net effect in the human rights area for a number of reasons: in contrast to other international institutions, human rights courts and bodies are increasingly receptive towards the interpretative technique of systemic

¹⁹⁸ D Kennedy, ‘The International Human Rights Regime: Still Part of the Problem?’ in R Dickinson et al. (eds), *Examining Critical Perspective on Human Rights* (CUP, 2014) 19.

¹⁹⁹ JH Knox, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/HRC/22/43, 24 December 2012 [51], [53].

²⁰⁰ P Allott, *Eunomia – New Order for a New World* (OUP, 2004) 6-8.

²⁰¹ Francioni (n 181) 54.

²⁰² E.g. Kamminga (n 4); AN Pronto, “‘Human-Rightism’ and the Development of General International Law” (2007) 20 LJIL 753.

integration;²⁰³ moreover, as discussed earlier, human rights is a persuasive and appealing discourse that can monopolise our attention; and, finally, judgments by prominent human rights courts are particularly influential and contain the promise of enforcement, especially vis-à-vis norms and treaties that lack monitoring mechanisms.²⁰⁴

To conclude, the consideration and possible incorporation of other interests under PIL into human rights and the role of systemic integration as an interpretation tool must not become our comfort zone. On the one hand, human rights bodies should acknowledge, engage with and integrate other concerns into their interpretation. On the other hand, and to the extent that the human rights structure and its conceptual tools fail to accommodate other concerns, we should continue exploring what is legally possible and acceptable for the international legal community.²⁰⁵ This could involve forging different norm interactions and synergies, looking into different international fora and enquiring into other approaches. One way forward could be to move in the direction of setting up more monitoring mechanisms and/or international judicialisation. In this way, various interests in international society would be evenly represented and more diverse approaches could be on the table. Yet, even if it is to be assumed that states would give their consent to establishing these mechanisms, international supervision (of a judicial nature or otherwise) in itself does not necessarily guarantee that we will respond effectively to emerging and complex questions. Human rights and international law expertise need to be creative in construing the law *and* mindful of their limitations.

IV. CONCLUSIONS

This article has argued that systemic integration is neither the ultimate answer to difficulties arising from the fragmentation of PIL nor a problem-free interpretative technique. Legal interpretation alleviates certain difficulties presented by fragmentation but it cannot resolve the need for international courts to do away with their fragmented lens and “piecemeal” decision-making. One might also assume that applying systemic integration within one functional regime – the human rights regime – would present

²⁰³ Gardiner (n 16) 310. See also the discussion in Simma and Kill (n 14); Van Damme (n 14).

²⁰⁴ Francioni (n 181) insists on expanding the human rights structure; cf. L Rajamani, ‘The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change’ (2010) 22 *Journal of Environmental Law* 391.

²⁰⁵ Aust, Rodiles and Staubach (n 168) 78-9 and references therein.

fewer challenges vis-à-vis applying systemic integration across different regimes. The analysis provided evidence demonstrating that this is not the case. In fact, it is perhaps a greater challenge to identify subtle contextual differences between treaties stemming from the human rights regime or to preserve the aims and specificity of the ECHR, the IACHR or the ACHPR vis-à-vis other treaties.

The application of systemic integration (or Article 31 (3)(c) with the goal of systemic integration in mind) should not be understood as the legal basis upon which to align the content of a treaty with the content of other treaties. Ensuring consistency and cross-fertilisation requires due appreciation of the contextual nuances in different treaties. In the current practice of the ECtHR and the IACtHR, we also encounter cases in which the Courts indirectly apply and supervise other treaties under the guise of systemic integration. Such instances seriously call into question the Courts' jurisdictional confines and mandates, if indeed they do not exceed them. The critical analysis in this article should not be seen as a call for textualism or a reduction in creativity. It is rather a call to be creative while striving for more rigorous methodology and transparency in legal reasoning and judgments. Legal reasoning is not merely a matter of rigid legal technique but encapsulates the delicate balance between, on the one hand, employing other treaties to interpret a treaty and, on the other hand, knowing where the limits to the exercise of interpretation lie.

Most importantly, this article has stressed that we should be aware of the (unintentional) ramifications of pursuing systemic integration or systemic integration-like interpretative exercises in the human rights area. A court's systematic engagement with other treaties, especially when those treaties lack a monitoring mechanism, may lead the exercise of undue interpretative authority over treaty provisions that are contested or unclear. Moreover, systemic integration does not always benefit the diversity of PIL or the development of other bodies of law. Providing the opportunity for other areas of PIL to reach their potential, addressing pressing global issues via different avenues or even acknowledging that human rights law cannot mitigate the prevalent policy incoherence in international law-making are viable alternatives to merely reducing various concerns to the human rights regime. These concerns are not frequently raised, notwithstanding the fact that international human rights courts have made important contributions to progressively developing both their own treaty regimes *and* other interests under PIL. Yet there remains a real risk that human rights practice and discourse will monopolise and subsume some of these interests.